Tong Tiong Lim v Pentadbir Tanah Daerah, Johor Bahru & Anor

HIGH COURT (JOHOR BAHRU) — ORIGINATING MOTION NO 25–29 OF 1991
HAIDAR J
9 SEPTEMBER 1994

Land Law *— Land administrator's right of way — Extinguishment — Evidence of alternative access not disclosed at first enquiry — Whether inquiry could be reopened — Whether order granting right of way can be set aside by second enquiry — Whether failure to comply with s 34(3) of the National Land Code 1965 vitiates order — National Land Code 1965 ss 34, 390, 395*

The applicant and his family had been using a footpath over Lot 2775, Bandar Johor, Bahru Grant No 27822 ('the lot') by paying rent of RM100 a year. Subsequently, the lot was sold to the second respondent who thereafter stopped the access unless the applicant agreed to pay an increased rental and compensation of RM6,000. However, the applicant refused to accept the offer and applied for the land administrator's right of way under s 390 of the National Land Code 1965 ('the NLC'). An enquiry was held and the assistant land administrator made an order ('the first order') giving access to the applicant subject to certain terms. The second respondent objected on the ground that the applicant had access through Lot 603 and, therefore, had no need for an access through the lot. As a result of her objection, a second assistant land administrator held another enquiry pursuant to s 395(1)(b) read with s 35 of the NLC on the ground that at the first enquiry, no evidence was disclosed regarding the availability of an access through Lot 603 and found that it was inexpedient for the first order to continue to exist and it should therefore be extinguished ('the second order'). The applicant has applied, inter alia, to set aside the second order and for the first order to be validated.

Held, dismissing the application:

(1) Section 395(1)(b) of the NLC gives the power to the land administrator to hold an enquiry and thereafter order the right of way already made to be extinguished if satisfied that it is inexpedient for it to continue to exist.

(2) It was clearly beyond dispute that at the first enquiry, the evidence of the availability of access through Lot 603 was not disclosed. However, the issue of such disclosure did not arise as the second respondent was at that time prepared to allow access through the lot subject to certain terms, but an agreement could not be reached. Therefore, the discretion to reopen the inquiry under s 34(1) read with s 34(2)(a) of the NLC was properly exercised.

(3) Although the second assistant land administrator failed to record briefly his reasons for reopening the enquiry as required under s 34(3), that requirement was only directory and not mandatory and did not vitiate the second order.

[Bahasa Malaysia summary

Pemohon dan keluarganya telah menggunakan suatu lorong jalan kaki yang merentasi Lot 2775, Bandar Johor, Bahru Geran No 27822 ('lot itu') dengan membayar sewa sebanyak RM100 setahun. Kemudiannya, lot itu telah dijual kepada responden kedua yang selepas itu telah menghentikan akses itu kecuali jika pemohon bersetuju membayar sewa tambahan dan pampasan sebanyak RM6,000. Bagaimanapun, pemohon enggan menerima tawaran itu dan telah memohon untuk suatu hak lalu-lalang pentadbir tanah di bawah s 390 Kanun Tanah Negara 1965 ('KTN itu'). Suatu siasatan telah diadakan dan penolong pentadbir tanah telah membuat suatu perintah ('perintah pertama itu') yang memberikan akses kepada pemohon tertakluk kepada terma-terma tertentu. Responden kedua telah membuat bantahan atas dasar bahawa pemohon boleh mendapat akses melalui Lot 603 dan oleh itu tidak memerlukan akses melalui lot itu. Akibat bantahannya itu, seorang penolong pentadbir tanah kedua telah mengadakan suatu siasatan mengikut s 395(1)(b) dibaca dengan s 35 KTN itu atas dasar bahawa pada siasatan pertama itu, keterangan mengenai adanya suatu akses melalui Lot 603 tidak didedahkan dan memutuskan bahawa adalah tidak mustahak bagi hak lalu-lalang itu terus wujud dan dengan demikian, ianya seharusnya dihapuskan ('perintah kedua itu'). Pemohon telah memohon, antara lain, untuk mengetepikan perintah kedua itu dan supaya perintah pertama itu disahkan.

Diputuskan, menolak permohonan itu:

(1) Seksyen 395(1)(b) KTN itu memberi kuasa kepada pentadbir tanah untuk mengadakan suatu siasatan dan kemudiannya memerintahkan supaya hak lalu-lalang yang telah dibuat itu dihapuskan jika beliau berpuas hati bahawa adalah tidak mustahak bagi hak itu terus wujud.

(2) Adalah jelas sehingga tidak boleh dipertikaikan bahawa pada siasatan pertama, keterangan mengenai adanya akses melalui Lot 603 tidak didedahkan. Bagaimanapun, isu berkenaan dengan pendedahan itu tidak timbul kerana pada masa itu, responden kedua bersedia membenarkan akses melalui lot itu tertakluk kepada terma-terma tertentu, tetapi persetujuan tidak dapat dicapai. Oleh yang demikian, budi bicara untuk membuka semula siasatan di bawah s 34(1) dibaca dengan s 34(2)(a) KTN itu telah digunakan dengan betul.

(3) Walaupun penolong pentadbir tanah kedua itu gagal mencatatkan secara ringkas sebab-sebab mengapa beliau membuka semula

siasatan itu seperti yang diperlukan di bawah s 34(3), keperluan itu hanyalah suatu panduan dan bukan mandatori dan tidak menjadikan perintah kedua itu tidak sah.] A

[*Editorial Note*: The applicant has appealed to the Court of Appeal.]

Notes B

For a case on the land administrator's right of way, see 8 *Mallal's Digest* (4th Ed) para 1418.

Case referred to

Si Rusa Inn Sdn Bhd & Ors v The Collector of Land Revenue, Port Dickson & Ors [1987] 1 MLJ 147 (refd) C

Legislation referred to

National Land Code 1965 ss 33–35, 395(1)(b), 418 D

Badrul Hisham (*Shahinuddin & Ranjit*) for the applicant.
A Rashid (Assistant Legal Adviser) for the first respondent.
Serene S Ong (*LM Ong & Co*) for the second respondent.

Cur Adv Vult E

Haidar J: Tong Tiong Lim, the applicant/appellant ('the applicant'), filed this originating motion on 13 November 1991 pursuant to s 418 of the National Land Code 1965 ('the NLC') seeking:

(1) to validate the order of the assistant land administrator dated 29 December 1990 ('the first order'); F

(2) the first respondent (Pentadbir Tanah Daerah, Johor Bahru) to comply with the first order;

(3) the order of the assistant land administrator dated 20 February 1991 ('the second order') be set aside and cancelled forthwith as it was null and void; and G

(4) costs to be paid by the first respondent and/or the second respondent.

Various grounds were set out in the originating motion. A number of affidavits were filed by the parties apart from the oral evidence of the assistant land administrator (SP1) who held the enquiry on 23 October 1990. H

Facts

According to the applicant, his family resided at No 28, Jalan Stulang Darat, 80300 Johor Bahru for about 40 years. He and his family had been using the access (footpath) along Lot 2775, Bandar Johor Bahru, Grant No 27822 ('the said lot') with permission from the previous owner, Encik Othman, by paying rent of RM100 a year. A receipt (exh TTL–1) was produced in support. Subsequently, the said lot was sold to the second I

A respondent who thereafter stopped the access to the applicant unless he agreed to an increase in the yearly rental of RM350 in addition to the compensation of RM6,000. However, I would like to point out here that the applicant was in error when he said that the previous registered owner of the said lot was one Othman. A perusal of the grant of the said lot
B (exh R–1) clearly showed that the previous registered owner was one Abdullah bin Hj Mohd Said. The receipt (exh TTL–1) would appear to have been issued by the father of the second respondent as the name seems to indicate. However, the second respondent, in her affidavit in reply (encl 7), did not touch on exh TTL–1. In para 2(d) of her affidavit (encl 7), the second respondent, on the application of the applicant,
C agreed to offer to the applicant access over the said lot subject to payments as suggested by her. However, the applicant refused to accept her offer and the second respondent then withdrew her offer.

The applicant, on the advice of his lawyer, made an application for the land administrator's right of way under s 390 of the NLC (see
D exh TTL–2). As a result, a notice was issued on 14 October 1990 (exh TTL–3) for an enquiry to be held on 23 October 1990 ('the first enquiry'). The first enquiry was held by Mohd Naim bin Nasir, Assistant Land Administrator, District of Johor Bahru ('the first assistant land administrator') and the second respondent, her husband, Encik Tong Hak
E Ni (registered owner of part of Lot 603), the applicant and his lawyer were present at the first enquiry.

According to para 9 of his affidavit (encl 2), the applicant deposed that the second respondent objected to his application on the ground that the land administrator's right of way should not be given on the said lot as
F access could be given on Lot 603 itself. With respect, this is not true as from the record of the enquiry (exh TTL–14), it could be seen that such evidence was not recorded in the enquiry proceedings. From TTL–14, it would seem clear to me that there was a discussion between the applicant and the second respondent in respect of the access of the applicant, and the second respondent stated certain terms to be met by the applicant. The
G applicant could not agree but was prepared to discuss them. The first enquiry was adjourned. I must say here that the recording of the enquiry held by the first assistant land administrator was far from satisfactory. In his oral evidence (at p 8 of the notes of evidence) he explained that the word 'keputusan' should read 'kenyataan pohon' and he further said that
H the first enquiry was adjourned for a decision and not for the parties to have a discussion. Subsequently, on 29 December 1990, he made the first order giving access to the applicant subject to certain terms (see exh TTL–4). Thereafter, he issued a letter dated 31 December 1990 (exh TTL–5) to the second respondent enclosing a copy of the first order and asking the second respondent to take appropriate action accordingly.
I

On the receipt of TTL–5, the second respondent objected to the first order made by the first assistant land administrator by way of a letter dated 13 January 1991 (TTL–7) setting out the grounds thereon. In essence, she said that the applicant has access through Lot 603 and, therefore, there

was no necessity for access through her land (see also para 2(e), (f) and (d) of her affidavit at encl 6).

As a result of her objection, Mohd Azman bin Mohd Ali, the assistant land administrator ('the second assistant land administrator') proceeded to have another enquiry ('the second enquiry') pursuant to s 395(1)(b) of the NLC read with s 35.

In his affidavit dated 26 February 1992, the second assistant land administrator gave his reasons at para 7 as to why he conducted the second enquiry. The principal reason was that at the first enquiry, no evidence was disclosed regarding the availability of access to the applicant through Lot 603. It is not true, however, for him to say at para 7(c) that the applicant or his lawyer did not object to the second enquiry to be held as, clearly from the records of the second enquiry (exh TTL–15), it was recorded that Encik Badrul Hisham contended that he (the second assistant land administrator) had no power to hold a second enquiry. Again, I must say that the record of the second enquiry is far from satisfactory.

I could quite understand that as the district land office was cited as a party, the first assistant land administrator was rather reluctant to give an affidavit in support of the applicant. As a result, an application was made by the applicant for the first assistant land administrator to give oral evidence instead. I allowed the application.

From the oral evidence of the first assistant land administrator (SP1), he admitted under cross-examination by the counsel for the second respondent that in the first enquiry, the applicant did not disclose an access available through Lot 603 towards the public road besides not stating his status in respect of his application before him. It would seem clear to me that the first enquiry was a 'rushed job' done by the first assistant land administrator.

Law

Section 395(1)(b) of the NLC gives the power to the land administrator to hold an enquiry and thereafter order the right of way already made to be extinguished if satisfied that it is *inexpedient* for it to continue to exist. Section 395(1) (b) of the NLC reads:

> The Land Administrator, where he is of the opinion that —
>
> (a) ...
>
> (b) it is inexpedient that a Land Administrator's right of way should continue to exist,
>
> may hold an enquiry and thereafter order the right of way to be extinguished.

In any enquiry under the NLC, s 33 of the NLC provides that a decision or order of the land administrator shall not be altered or added to except for the purpose of correcting verbal errors or remedying some accidental defect or omission not affecting a material part of the enquiry. However, s 33 provides the special circumstances specified in s 34 of the NLC for the

A reopening of an enquiry. It is relevant therefore to quote s 34 in full. Section 34 reads:

> Re-opening of enquiry
>
> (1) In any of the circumstances specified in sub-section (2), a Land Administrator may re-open any enquiry held under this Act by himself
B or *any predecessor in office* and, where it appears to him just to do so, may vary or *set aside* any decision or *order previously given or made therein*:
>
> Provided that no enquiry shall be re-opened under this section —
>
> (i) at any time after an appeal has been lodged therein as mentioned in section 37, unless the appeal is subsequently withdrawn, or
C
> (ii) more than three years after the date on which any decision or order therein was first given or made.
>
> (2) The said circumstances are as follows —
>
> (a) *where fresh evidence of a material nature is available, not being evidence which could, by the exercise of reasonable diligence, have been produced*
D *at any earlier hearing*;
>
> (b) where any earlier hearing was conducted in the absence of any necessary or proper party whose absence was not due to any default or neglect on his part.
>
> (3) A Land Administrator shall record briefly his reasons for re-opening
E any enquiry under this section. (Emphasis added.)

It would seem clear to me and beyond any dispute that at the first enquiry, the evidence of the availability of access to the applicant through Lot 603 was not disclosed. The issue is whether the fresh evidence as envisaged by s 34(2)(a) of the NLC could, by the exercise of reasonable diligence, have
F been produced at the first enquiry. In this context, I have to examine what transpired at the first enquiry. From the record of the first enquiry, it would appear that the second respondent was prepared to allow access through her land by the applicant subject to certain terms. Agreement on the terms apparently could not be reached by the parties and the first assistant land administrator proceeded to make the first order. In the
G circumstances, the disclosure that an access already existed for the applicant did not arise and, similarly, the exercise of reasonable diligence to produce such evidence at the first enquiry. As no agreement could be reached, she was entitled to object to the applicant having access through her land as the evidence shows that the applicant could have access through Lot 603.

H The word 'expedient' was considered by Peh Swee Chin J in *Si Rusa Inn Sdn Bhd & Ors v The Collector of Land Revenue, Port Dickson & Ors* [1987] 1 MLJ 147 where at p 152, his Lordship said:

> Any authority that is conferred on a public official to grant a right of way against a landowner for the benefit of another has to be exercised (considering
I the combined effect of the passage cited from *Sri Lempah*'s case [1979] 1 MLJ 135 and the deliberate use of the word 'expedient' in the relevant section of the Code) for a proper purpose and reasonably unless exceptional circumstances exist.

In this case, I am of the opinion that the second assistant land administrator, having regard to the fresh evidence, that is, the availability of access through Lot 603 by the applicant and, further, that no exceptional circumstances existed, had exercised his discretion correctly to hold that it was inexpedient for the first order to continue to exist and it should therefore be extinguished.

As the second respondent was not caught by the proviso to s 34(1) of the NLC and having satisfied the circumstances set out in s 34(2)(a) to be read with s 395(1), the second assistant land administrator was empowered under the NLC to hold the second enquiry and to set aside the first order. Even though it seems clear from the record of the second enquiry that the second assistant land administrator had not complied with sub-s (3) of s 34 by not recording briefly his reasons for reopening the second enquiry, I am of the view that such requirement is only directory and not mandatory. The failure to do so does not render the second enquiry null and void and vitiate the second order made thereon. In the circumstances, the contention of the applicant that the second enquiry is null and void and the second assistant land administrator being functus officio does not arise at all. The first respondent supported the second order made by the second assistant land administrator.

For the reasons set out by me, I would dismiss this originating motion with costs and accordingly, I affirm the second order made by the second assistant land administrator.

Application dismissed.

Reported by Anne Khoo